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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. _____

PHILIP J. BROWN, et al.,

Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES
LIMITED PARTNERSHIP, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 26, 1988

56 pp

QUESTIONS PRESENTED

1. DOES RELIEF FROM JUDGMENT ON THE BASIS OF FED.R.CIV.P. 60(b) INCLUDE THE SITUATION WHERE THE FACTS SUPPORTING SUCH RELIEF OCCURRED BEFORE JUDGMENT, BUT THE TENDERED EVIDENCE OF THE FACTS CAME INTO EXISTENCE ONLY AFTER JUDGMENT?

2. WHERE NEWLY DISCOVERED EVIDENCE IS PRESENTED OF FRAUD COMMITTED UPON PARTIES UNDER THE PROTECTION OF THE COURTS IN CHAPTER 11 BANKRUPTCY PROCEEDINGS, DOES A COURT OF APPEALS ABDICATE ITS RESPONSIBILITY TO SUPERVISE THE JUDICIARY BY SUMMARILY REFUSING TO GRANT RELIEF FROM JUDGMENT UNDER FED.R.CIV.P. 60(b)?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, Philip J. Brown and William J. Brown, and respondents, 1250 Twenty-Fourth Street Associates Limited Partnership and Joseph W. Kaempfer, Jr. American Security Bank, N.A. was an intervenor in support of respondents. John W. Guinee, Jr., Trustee for Philip J. Brown and William J. Brown, was a defendant in the proceeding before the district court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Philip J. Brown and William J. Brown (collectively referred to as "Petitioners"), respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on June 28, 1988.

OPINIONS BELOW

The Memorandum Order of the United States District Court for the District of Columbia (Pratt, J.), entered November 18, 1987, has not been reported. It is reprinted in the Appendix hereto, pages App-3 - App-15, infra.

The Order of the United States Court of Appeals for the District of Columbia Circuit, entered June 28, 1988, has not been reported. It is reprinted in the Appendix hereto, pages App-16 - App-17, infra.

JURISDICTION

The proceedings below were initiated on January 24, 1986 when respondents, 1250 Twenty-Fourth Street Associates Limited Partnership and Joseph Kaempfer filed an adversary action, in the United States Bankruptcy Court for the District of Columbia, against Petitioners, debtors in a Chapter 11 bankruptcy proceeding.

Petitioners counterclaimed, seeking damages and trial by jury. The bankruptcy court referred this adversarial litigation to the United States District Court for the District of Columbia.

On March 12, 1986, the United States District Court (Oberdorfer, J.) entered an order disposing of certain counts of both Respondents' complaint and Petitioners' counterclaim. On May 13, 1986, the district court granted summary judgment in favor of the Respondents on their complaint and against Petitioners on their counterclaim.

Petitioners appealed this order to the United States Court of Appeals for the District of Columbia Circuit. Summary affirmance was granted to the Respondents on December 15, 1986. On January 14, 1987, the Petitioners filed a Petition for Reconsideration with the court of appeals. That Petition was denied by order dated February 17, 1987 (pages App-1 - App-2,

infra).

On May 12, 1987, Petitioners filed with the district court a motion for relief from judgment, pursuant to Fed.R.Civ.P. 60(b). By memorandum order of November 18, 1987, Petitioners' motion was denied (pages App-3 - App-15).

Petitioners appealed this decision to the District of Columbia Circuit. By order dated June 28, 1988, the United States Court of Appeals for the District of Columbia granted Respondents' motion for summary affirmance (pages App-16 - App-17). No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Fed.R.Civ.P. 60(b), 28 U.S.C. Relief From Judgment or Order; Mistakes, Inadvertence, excusable neglect; newly discovered evidence; fraud, etc.

> On motion and upon such terms as are just, the court may

relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective applications; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the

> procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

In late 1981, Petitioners filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Columbia. In July, 1982, the bankruptcy court appointed a Trustee to manage debtors' property.

In November, 1983, the Trustee filed an amended plan of arrangement. The centerpiece of this plan was a set of agreements between the Kaempfer Company, as lessee, and the Petitioners, as landlord, for a ninety-nine year ground lease for valuable real estate located in Washington, D.C. As part of the transaction arranged pursuant to the Trustee's plan, the parties purportedly executed a first amendment to the ground lease on December 23, 1983.

In January, 1984, the bankruptcy court

confirmed the Trustee's amended plan of arrangement and authorized and directed the Trustee to execute the necessary agreements, including the ground lease as amended. On October 11, 1984 the Trustee purportedly executed, ratified and confirmed the ground lease and amendments thereto, including the first amendment. Thereafter, construction of a commercial building on Petitioners' property began.

In January, 1986, disputes arose between the Petitioners and the Respondents concerning the calculation of rent, costs and other matters under the terms of the lease arrangement. Respondents 1250 Twenty-Fourth Street Associates Limited Partnership, assignee of the lease, and Joseph Kaempfer brought an adversarial action in the bankruptcy court seeking confirmation of their calculation of rent and other matters concerning the lease. Petitioners counterclaimed that respondents had defrauded them out of the full amount

of rent due for the property and that Respondents had failed to comply with their agreements. Petitioners' counterclaim for damages, together with a jury demand, prompted the bankruptcy court to refer the adversarial litigation to the United States District Court for the District of Columbia.

The primary issue before the district court concerned the appropriate calculation of rent under the ground lease. Petitioners contended that during the negotiations of the lease, it was clear they would be paid on the basis of each and every square foot of commercial space built and leased anywhere in the building. Respondents countered that the explicit terms of the first amendment to the ground lease limited the calculation of rental payment to the commercial floor area ratio.

On the basis of the explicit language of the first amendment to the ground lease ("first amendment"), the district court

held that the terms governing the calculation of annual rent were clear and unambiguous and, therefore, granted Respondents' motion for summary judgment. The district court found that the initials of Petitioners Philip and William Brown on each page of the first amendment, as well as the signature of Philip Brown, indicated that Petitioners had read the contract. The district court reasoned that, having read the contract, Petitioners could not now rely on Respondents' purported representations as to what the contract provided.

Petitioners appealed the lower court's granted of summary judgment in favor of the Respondents to the United States Court of Appeals for the District of Columbia Circuit. In December, 1986 the court granted summary affirmance to the Respondents. The court of appeals found that the district court properly held that the first amendment to the lease

ambiguously employed the term "floor area ratio" and that in light of the unambiguous language of the lease, the district court was compelled to refuse to consider extrinsic evidence of the parties' intent.

When Petitioner Philip Brown reviewed the court of appeals opinion and noted the language, "[Petitioners] do not deny having read and initialled each page," he thereupon closely reviewed the ground lease and first amendment which had been given to Petitioners' counsel by Respondents' attorneys during the hearing on summary judgment. Upon review, Brown discovered that he had not initialled each page and, furthermore, that the signature "Philip J. Brown" affixed to the first amendment was not in his handwriting.[1]

As a result of his observations, Petitioner Philip Brown had noted

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[1]Philip Brown also noticed and believes that the notarial certificate pertaining to his alleged signature on the first amendment is false.

questioned document examiner James T. Miller conduct an examination. Following his analysis, Mr. Miller reported that Philip J. Brown did not write the "Philip J. Brown" signature to the first amendment and that there were other suspicious features pertaining to signatures on the document. Petitioner also sought a second opinion from Dr. David Crown, former chief of the Central Intelligence Agency's questioned document laboratory. Dr. Crown rendered a tentative conclusion that the signature of "Philip J. Brown" on the first amendment was not "an authentic signature of Philip J. Brown."

Based upon initial reports of these eminent handwriting and questioned document examiners, the Petitioners filed a petition for reconsideration of the court of appeals decision. The court of appeals denied the petition without prejudice to the Petitioners' right to move in the district court for relief of judgment on the ground

of newly discovered evidence pursuant to Fed.R.Civ.P. 60(b) (pages App-1 - App-2, infra).

Following the court of appeals order of February 17, 1987, Petitioners document expert (Dr. Crown) rendered a second report which raised further questions concerning the preparation of the first amendment. Dr. Crown's report emphasized that examination of the original first amendment was "essential."

Based upon these reports of Petitioners' document experts and, in conformity with the court of appeals' February 17, 1987 order, Petitioners filed, in the district court, a motion for relief from judgment, pursuant to Fed.R.Civ.P. 60(b).

In opposing that motion, Respondents submitted a report to the court from John W. Hargett, their questioned document examiner. Significantly, Mr. Hargett's report did not refute Petitioners'

contention that the signature of "Philip J. Brown" on the first amendment was a forgery.

In response to Mr. Hargett's report, Petitioners' document experts submitted additional reports. These reports held that there likely were additional versions of the first amendment in existence.

By memorandum order dated November 18, 1987, the United States District Court for the District of Columbia (Pratt, J.) denied Petitioners' motion for relief from judgment on the primary grounds that: (1) Petitioners' evidence of forgery was not, as a matter of law, "newly discovered evidence" within the meaning of Rule 60(b). Further, the Petitioners failed to exercise due diligence in their discovery of the alleged forgery, and (2) the Petitioners failed to file their motion for relief from judgment within a reasonable time.[2]

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[2]The district court did not address whether Philip Brown's signature on the first amendment was a forgery because the

Petitioners appealed the district court's decision to the District of Columbia Circuit. Respondents, by motion, sought summary affirmance of the district court order. In response, Petitioners made the following points:

(1) Petitioners did not have copies of the ground lease or the first amendment in their position until Respondents' produced these documents at the time they moved for summary judgment before the district court. After the district court granted summary judgment and its order was affirmed by the court of appeals, Philip Brown discovered the discrepancy with respect to his signature. After this

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court determined that the authenticity of the signature had no bearing on the validity of the first amendment. According to the court, the ground lease and first amendment were ratified and executed by the bankruptcy Trustee, who was the only person with legal authority to enter into the ground lease and the first amendment on behalf of Petitioners. The court did not address whether the trustee would have ratified the lease had he known that it contained the forged signature of Philip Brown.

discovery, Petitioners sought expert opinions from document examiners before raising this matter to the attention of the court. Once these examiners provided evidence that Philip Brown's name had been forged, Petitioners did act to bring this evidence of forgery before the court.

(2) Petitioners filed their motion for relief from judgment within the one year limitation set forth in Fed.R.Civ.P. 60(b) and in a reasonable time after the document experts provided evidence of the forgery.[3]

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[3]With respect to the district court's opinion that evidence of forgery was irrelevant as a matter of law, Petitioners pointed out that the Trustee intended to ratify the first amendment in light of the understanding that the Petitioners had negotiated the agreement and had signed and approved the document. Absent knowledge of material facts, i.e., that Philip Brown's signature had been forged, ratification by the Trustee was not possible. See, e.g., Chicago Title Insurance Co. v. Progressive Housing, Inc., 453 F.Supp. 1103 (D.C.Co. 1978). Full knowledge an of unauthorized act, and of all material matters related to it, is an essential element of a valid ratification, Matter Commodities, Inc. v. Texas Cattle Management Co., 586 F.2d 1352 (10th Cir. 1978).

By order entered June 28, 1988, the court of appeals summarily affirmed the lower court's denial of Respondents' Motion for Relief from Judgment (pages App-16-App-17, infra). The circuit court's order did not address the arguments raised by Petitioners, but simply affirmed the district court's decision for substantially the same reasons as set forth in that court's memorandum order.

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE DISTRICT COURT, AS AFFIRMED BY THE DISTRICT OF COLUMBIA CIRCUIT, IMPROPERLY INTERPRETS THE TERM "NEWLY DISCOVERED EVIDENCE" AS USED IN FED.R.CIV.P. 60(b) AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The issue raised by Petitioners' motion for relief from judgment was whether relief from judgment on the basis of Fed.R.Civ.P. 60(b) includes the situation where facts supporting such relief occurred before judgment, but the tendered evidence was not discovered until after judgment. Petitioners contend that Rule 60(b)(2)

encompasses the above situation and the facts in this case fall squarely within the matrix of relief offered by the rule.

In the context of a Rule 60(b) motion, three different combinations of circumstances are possible. First, both the facts and the evidence of those facts existed prior to judgment. This situation clearly falls within the ambit of Rule 60(b) as constituting "newly discovered evidence." See NLRB v. Jacob E. Decker & Sons, 569 F.2d 357 (5th Cir. 1978) ("evidence must be in existance at the time of trial"); Prostrollo v. University of South Dakota, 63 F.R.D. 9 (D.S.D. 1974). Second, both the facts and evidence come into being only after judgment is rendered. Unquestionably, a party here may not invoke Rule 60(b) under these circumstance. See Washington v. United States, 214 F.2d 33 (9th Cir. 1954) (new facts cannot justify relitigation; "the policy of law in having an end to litigation, would in most cases

prevent the reopening of a case because of after occurring events").

The third situation arises where the facts occurred before judgment, but the tendered evidence of those facts came into existence only after judgment was rendered. This is the situation that was presented by Petitioners to the district court: the fact of the forged signature occurred prior to judgment, but the tendered evidence of such forgery -- the reports of document experts -- came into existence only after judgment. In this situation, courts have recognized that Rule 60(b) is applicable. See Chilson v. Metropolitan Transit Authority, 796 F.2d 69 (5th Cir. 1986); Rosebud Sioux Tribe v. A&P Steele, Inc., 733 F.2d 509 (8th Cir. 1984).

In considering Petitioners' motion for relief from judgment, the district court not only confused which of the above-three situations was applicable, but, moreover, decided the matter based upon a legal

standard that was totally erroneous as a matter of law. Thus, in addressing Petitioners' motion, the district court stated "evidence in the possession of a party before judgment is rendered is logically not 'newly discovered evidence' within the meaning of the rule." (Pages App-8 - App-9, infra.) (Emphasis in original.)

The correct legal standard is precisely the opposite of that stated by the district court. The evidence, or at least the underlying facts, must be in existence before judgment in order for such evidence to constitute "newly discovered evidence" within the meaning of Rule 60(b). See Jacob E. Decker, 569 F.2d at 357; Chilson, 796 F.2d at 69. By affirming the district court's order, therefore, the District of Columbia Circuit has approved an interpretation of "newly discovered evidence" under Rule 60(b) which is in conflict with the proper interpretation of

the Rule as set forth in well-recognized decisions of other courts of appeal.

The affirmance by the District of Columbia Circuit of the district court's order also creates confusion as to the proper approach in analyzing a Rule 60(b) motion based upon "newly discovered evidence." In its opinion, the district court failed to appreciate the distinction between facts which occurred before judgment and the tendered evidence of those facts which came into existence after judgment was entered. The district court erroneously telescoped the two concepts, thereby creating a confusing analysis of what, as a matter of law, constitutes "newly discovered evidence."

Although the evidence of the forgery of Philip Brown's signature, as demonstrated by the tendered reports of Petitioners' document experts, did not come into existence until <u>after</u> judgment, the facts upon which such evidence was derived

were in existence prior to judgment. Hence, Petitioners' tendered evidence came within the third situation under which Rule 60(b) is properly invoked.

Cases from other circuits clearly show the correctness of Petitioners' motion for relief from judgment and illustrate the erroneous nature of the standard employed by the district court, as affirmed by the court of appeals, in this matter. See Rosebud, supra, 733 F.2d 509; Chilson, supra, 796 F.2d 69.

In Rosebud, the appellant argued that perjury by a witness in a deposition, discovered after trial, was grounds for the granting of a 60(b)(2) motion on the basis of newly discovered evidence. The trial court refused to grant this motion "because the evidence of Lone Dog's [the witness] inconsistent stories did not exist at the time of trial." 733 F.2d at 516. In reversing the denial of the motion, the court of appeals indicated that the lower

court had applied the wrong legal standard: "if . . . his deposition contained perjured testimony, then the perjury existed at the time of trial . . . it does not matter that an admission of perjury came to light only after trial." 733 F.2d at 516.

The important legal concept enunciated by the Eighth Circuit in Rosebud is that "newly discovered evidence" under Rule 60(b) encompasses the situation where the facts existed at the time of trial, although they only became known and relevant as evidence at a later time.

In the case at bar, the district court simply misstated and misconstrued the proper definition of "newly discovered evidence" by concluding that facts in the possession of a party at the time of trial cannot later be considered as comprising "newly discovered evidence." Contrary to the district court's statement, as affirmed by the District of Columbia Circuit, newly discovered evidence by nature includes

facts which exist at the time of trial, but which may not have been put into a proper context as evidence until after a trial.

The Fifth Circuit decision in Chilson clarifies this principle. In Chilson the appellant was discharged from his employment with the Metropolitan Transit Authority of Houston ("MTA"), the appellee. At the MTA, appellant's responsibilities included the monitoring and budgeting of contracts. His lawsuit alleged that he was retaliatorily discharged for criticizing a contract made by the MTA. Appellant's evidence was insufficient at his jury trial and a verdict was returned against him. Three days short of one year later, appellant asked the court for relief from the judgment under Rule 60(b)(2) on the grounds of newly discovered evidence, i.e., an audit of the MTA showed that the MTA had made a $2.6 million overpayment on the contract in question. The trial court denied the motion, "on the grounds that the

audit was not 'newly discovered evidence' within the meaning of the Rule, but was 'new' evidence." Chilson, 796 F.2d at 69-70.

The Fifth Circuit reversed, holding that the district court had employed an incorrect legal standard in determining what constituted "newly discovered evidence" under the Federal Rules:

> Normally, of course, the standard for review of a decision denying a new trial under Rule 60(b)(2) is a determination of whether the district court abused its discretion. In this case, however, the district court did not exercise its discretion. Instead, it simply decided as a matter of law that there was no eligibility for the appellant's motion to be given discretionary consideration on the basis of newly discovered evidence. We must reverse the decision of the district court . . . .

796 F.2d at 72.

In the present case, by summarily affirming the lower court's use of an erroneous legal standard, the District of Columbia Circuit abdicated its responsibility to insure that the

appropriate standard of law was applied to Petitioners' Rule 60(b) motion. Further, the court of appeals, by affirming the district court's order, has created confusion as to what constitutes "newly discovered evidence" under Rule 60(b). The definition of "newly discovered evidence" enunciated by the district court, as well as the court's analysis of the term, is directly at odds with the definition adopted by other courts and is not in conformity with the purposes of Rule 60(b). Consideration by this Court is required to clarify what has been made a confusing matter of law.

II. BY SUMMARILY AFFIRMING THE DISTRICT COURT'S MEMORANDUM ORDER, THE DISTRICT OF COLUMBIA CIRCUIT ABDICATED ITS OBLIGATION TO INSURE AND PRESERVE THE INTEGRITY OF JUDICIAL PROCEEDINGS

It has been said that Rule 60(b) motions serve a "useful, proper and necessary purpose in maintaining the integrity of the trial process." Rosebud, 733 F.2d at 515. The rule is intended "to

prevent the judgment from becoming a vehicle of injustice." United States v. Walus, 616 F.2d 283, 288 (7th Cir. 1980). Thus, the rule is to be given a "liberal construction" and "is to be construed liberally to do substantial justice." Johnson Waste Materials v. Marshall, 611 F.2d 593, 600 (5th Cir. 1980), quoting Laguna Royalty Co. v. Marsh, 350 F.2d 817, 823 (5th Cir. 1965). See also, Edgar v. Finley, 312 F.2d 533, 538 (8th Cir. 1963).

In determining whether to grant a Rule 60(b) motion, courts have recognized that they must strike a "delicate balance between the sanctity of final judgment . . . and the incessant demand of a court's conscience that justice be done in light of all the facts." Good Luck Nursing Home, Inc. v. Harris, 636 F.2d 572, 577 (D.C.Cir. 1980), quoting Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), cert.denied, 399 U.S. 927 (1970).

In this case, the command that justice

must be done was particularly strong because the evidence of forgery and alteration of documents occurred while Philip and William Brown were operating under the protection of the United States Bankruptcy Court. It cannot be emphasized too strongly that the evidence of forgery of Philip Brown's signature on the critical document at issue in the case was not merely done during normal commercial dealings, but, rather, while Mr. Brown was within a voluntary Chapter 11 bankruptcy proceeding. Further, the first amendment was ratified, or intended to be ratified, by the bankruptcy Trustee and presented to the court for confirmation as part of a plan of arrangement. The bankruptcy court, thereafter, approved and gave it's imprimatur to this plan of arrangement, which newly discovered evidence now suggests was based upon a forged document.

In considering Petitioners' appeal from the district court's denial of the

Rule 60(b) motion, the court of appeals not only failed to insure that the requisite "delicate balance" was struck between the finality of judgment and the command to due justice, but, indeed, failed to insure that any balance whatsoever was struck. In summarily affirming the district court's order, the circuit court simply ignored the newly discovered evidence of forgery and alteration of documents which was committed during the course of a Chapter 11 bankruptcy proceeding.

Summary disposition is appropriate only where the merits of the claim are so clear as to justify expedited action by the court of appeals and there is no plausible argument that the decision of the court below is not in accordance with law. See Goldstein v. Riggs National Bank, 459 F.2d 1161 (D.C.Cir. 1972); Ambach v. Bell, 686 F.2d 974 (D.C. Cir. 1982). Such was not the situation here, where Petitioners presented evidence of fraud committed

during the course of a Chapter 11 bankruptcy proceeding and when the district court analyzed Petitioners' motion for relief from judgment using an incorrect legal standard. Indeed, the Eighth Circuit has admonished appellees against filing motions to dispose of appeals on the merits and, instead, has required compliance with the normal briefing schedule. See King v. Space Carriers, Inc., 591 F.2d 63 (8th Cir. 1979); United States v. Woodruff, 596 F.2d 798 (8th Cir. 1979).

While district courts may have discretion in balancing the conflicting policies raised by a 60(b) motion, courts cannot simply abdicate their responsibility to strike this "delicate balance." To do so gives a clear message to the public that even though there is evidence that fraud has occurred under the protection of the courts, such activity will not be investigate nor condemned. Rather, it will be condoned.

Petitioners respectfully submit that by granting summary affirmance to the district court's memorandum order, the court of appeals sent this clear signal not only to all those who have sought or will seek the protection of the bankruptcy courts, but also to the public at large.

At the very least, when presented with newly discovered evidence of forgery and alteration of documents, the court of appeals should have preserved the "delicate balance" by remanding the matter to the district court for discovery and hearings relative to these serious charges. This course was adopted by the Seventh Circuit in Ervin v. Wilkinson, 701 F.2d 59 (7th Cir. 1983), where the court remanded the matter with instructions to the district court to conduct a hearing on the appellant's charges.

Public confidence in the judiciary is an issue with which this Court has long been concerned. See, e.g., Berger v.

United States, 255 U.S. 22 (1921); Pennekamp v. Florida, 328 U.S. 331 (1946); United States v. Grinell Corp., 384 U.S. 563 (1966). Today, confidence in the judiciary is even more important as federal courts are faced with making fundamental policy decisions and holding individuals, corporations and governmental entities in contempt for failing to follow their directives. The action by the District of Columbia Circuit in summarily affirming the district court's refusal to reopen this matter and investigate evidence of forgery committed while the parties were operating under the protection of the federal judiciary, certainly creates suspicion as to the openness and honesty of the judicial system.

The action of the court of appeals in refusing to give consideration to Petitioners' evidence of forgery and fraud clearly cries out for redress. Lower courts need guidance from this Court as to

their responsibilities in maintaining the integrity and high standards required of the federal judiciary. See LaBuy v. Howes Leather Co., 352 U.S. 249, 259 (1957) ("We believe that supervisory control of the District Courts by the Courts of Appeal is necessary to to proper judicial administration in the federal system"). Plenary consideration of the matter by this Court, therefore, is essential.

CONCLUSION

For these various reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 26, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986
CA No. 86-00474

No. 86-7007

FILED: February 17, 1987

1250 Twenty-Fourth Street
Associates, et al.

v.

Phillip J. Brown, et al.

BEFORE: RUTH B. GINSBURG, WILLIAMS and
D.H. GINSBURG, Circuit Judges

O R D E R

Upon consideration of appellants' petition for reconsideration, filed January 14, 1987, it is

ORDERED, by the Court, that the petition is denied without prejudice to appellants' right to move in the district court for relief from the judgment on grounds of newly discovered evidence, Fed. R. Civ. P. 60(b).

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 86-0474
PHILLIP J. BROWN, et al.,	)	
Defendants.	)	

FILED
NOV 18, 1987

MEMORANDUM ORDER

Before us is defendants'[1] Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b)(2). We have previously considered this case on several occasions and will not recite again the detailed background of the present action. See Memorandum Opinions of April 28, 1986 and May 13, 1986. A brief review of the chronology is all that is necessary. On May 13, 1986 we issued an order 1) denying

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[1]The term "defendants" in this opinion shall hereinafter refer only to the debtor-defendants.

defendants' motion for permission to issue a third notice of default; (2) granting plaintiffs' motion for summary judgment with regard to all counts of the complaint and counterclaim; 3) declaring defendants' notices of default Nos. 1, 2 & 3 invalid and without merit; and 4) permanently enjoining defendants and their representatives from issuing any notice of default under the Ground Lease without first obtaining the approval of this court, until plaintiffs obtained permanent financing for the development and construction of the 1250 24th Street project.

On May 23, 1986 defendants moved for reconsideration of our May 13, 1986 order. We denied this motion. Defendants subsequently appeal portions of our decision, and on December 15, 1986 the United States Court of Appeals for the District of Columbia Circuit summarily affirmed. On January 14, 1987 the

defendants filed a petition for reconsideration of the Court of Appeals' decision. That petition was denied on February 1, 1987. On May 12, 1987, almost one year after we had issued our May 13, 1986 order, and more than three months after the Appellate Court's most recent denial, defendants filed this Fed. R. Civ. P. 60(b)(2) motion for relief from judgment. After careful consideration of the briefs filed by the parties and the record as a whole, we deny defendants' motion for the reasons stated below.

Discussion

Defendants asserted that Philip Brown's signature on the First Amendment to the Ground Lease ("First Amendment") is a forgery, and that the document submitted to this court for its consideration in this litigation shows signs of alteration, and contains a false notarial signature. We find that, even assuming arguendo that

defendants' assertions are true,[2] denial of this motion is appropriate.

A district court may in its discretion

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[2]We find it unnecessary to address whether defendants' assertions are true, because we find that defendants' allegations of forgery are irrelevant as a legal matter. The authenticity of Philip Brown's signature has no bearing on the validity or enforceability of the First Amendment. On December 22, 1981 the defendants filed for protection under Chapter 11 of the United States Bankruptcy Code. The Bankruptcy Court appointed a Trustee to manage the defendants' property on July 22, 1982. On January 10, 1984 the Bankruptcy Court confirmed the Trustee's Amended Plan of Arrangement, including the Ground Lease and the First Amendment, and ordered the Trustee to ratify and execute a series of agreements, including the First Amendment. On October 11, 1984 the Trustee executed a Certificate of Ratification. The Trustee was the only person with the legal authority to enter into the Ground Lease and First Amendment on behalf of the defendants. While defendants challenge the validity of the Trustee's ratification, we find no merit in these arguments. The Trustee has indicated that his signature on the document is authentic, and that he intended to ratify the First Amendment thereby. Defendants' Reply Memorandum in Support of Motion for Relief from Judgment, Ex. P (Trustee Affidavit). We find no evidence that the Trustee relied on the presence of Philip Brown's signature in deciding to sign himself. In Addition, the Trustee has reaffirmed his signature. Trustee Response to Def. Motion for Relief from Judgment, at 1.

relieve a party from final judgment, order or proceeding pursuant to Fed. R. Civ. P. 60(b)(2) when the party establishes the existence of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The Rule requires that such motions be made "within a reasonable tim", but in no case later than one year after judgment. Upon examination of these factors, we find that 1) the evidence in question, if its exists, could have been discovered and presented to this court far earlier had defendants exercised due diligence and 2) that defendants failed to file this motion within a "reasonable" period of time after the issuance of our order. We emphasize that each of these findings would be in and of itself sufficient to support our decision in this matter.

A. Due Diligence

We find that defendants failed to

exercise due diligence in their discovery of the alleged forgery, document alteration and false notarial signature. The moving party bears the burden of showing why it did not discover and present the evidence in question prior to the court's disposition of the matter. See 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2859, at 184-85 (1973), and cases cited therein. Defendants have failed to demonstrate why they could not have discovered the evidence in question by the exercise of due diligence. In fact, defendants "discovered" the alleged irregularities in the First Amendment by having Philip Brown and several document experts examine the very same document which had been in their possession during the course of this litigation. Defendants' Memorandum in Support of Motion for Relief from Judgment ("Def. Memo.") at 6. Evidence in the possession of a party before judgment is rendered is logically

not "newly discovered" evidence within the meaning of the Rule. See 11 C. Wright and A. Miller, supra, §2859, at 182-83. In any case, defendants clearly had the ability to discover the alleged defects in the document long before our judgment.

We also find that defendants demonstrated a lack of diligence in their failure to investigate the validity of the documents once various factors presented themselves. The First Amendment was the focus of attention throughout the course of this litigation. If, as defendants contend, the terms of the First Amendment which Philip Brown actually signed varied from those in the document presented to this court in such a way as to possibly affect the outcome of this litigation,[3] a

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[3]The movant bears the burden in the Fed. R. Civ. P. 60(b)(2) context of establishing that the "newly discovered evidence changes the factual picture of a case to such an extent that, under the applicable legal principles, the district court would likely reach a different result." Washington Mobilization Committee v. Jefferson, 617 F.2d 848, 580 (D.C. Cir.

diligent party would have noted the contrast in terms, or unexplained discrepencies [sic] in interpretation, and examined the document to ensure its validity.

In any case, defendants should have questioned the validity of the document immediately following our May 13, 1986 order, if not before. Defendants, in what appears to be a virtual admission of their lack of due diligence, assert that they were not on notice of the defects in the document until they read the Court of Appeals decision of December 15, 1986, nothing that "defendants [did] not deny having read and initialed each page" of the First Amendment. This, they assert, triggered Philip Brown's inquiry into the validity of the document. The language in

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1980). Defendants assert that consideration of the "newly discovered" evidence presented would likely alter our decision. We have severe doubts, but express no opinion on this matter at this time.

our decision six months earlier should have triggered similar concerns. In that order we noted that "[d]efendants had a duty to read the contract, and [that] their initials on each page indicate[d] that they [had done so]." Memorandum Opinion of May 13, 1986 at 12. Phillip Brown's failure to pursue this matter following the entry of our decision clearly demonstrates a lack of due diligence regarding the discovery of the evidence in question. But this is not the only defect which undermines defendants' motion for relief from judgment.

B. Reasonable Time

A Fed. R. Civ. P. 60(b)(2) motion must be denied as untimely if it is filed more than one year after judgment. Ackerman v. U.S., 340 U.S. 193, 197 (1950); Goland v. CIA, 607 V.2d 339, (D.C. Cir. 1978). It must be filed within a reasonable time and not more than one year after judgment. While this motion was filed several days

before the absolute deadline, we note that the one year time period reflects the "extreme limit" within which a party may file a motion for relief from judgment based on the existence of newly discovered evidence.

We issued the order from which defendants seek relief on May 13, 1986. Defendants filed this motion on May 12, 1987. We find that defendants failed to present a valid justification for their delay in filing, and that in light of all the facts, defendants did not file this motion within a reasonable period of time following our order.

As noted, defendants should have been aware of the alleged irregularities in the document since at least as early as May 13, 1986, when we issued our order. Even assuming, however, that the defendants' late discovery of the alleged defects in the document in December 1986 was excusable, defendants failed to file this

motion until May 12, 1987. Thus is was filed over three months after the Court of Appeals issued its February 1, 1987 order denying defendants' motion for reconsideration without prejudice to their right to move in this court for relief from judgment under Fed. R. Civ. P. 60(b)(2).[4] Defendants present no explanation for their more than three month delay in filing. We find that this delay is sufficient reason alone to find that defendants failed to file this motion within a reasonable time of our initial decision.

Fed. R. Civ. P. 60(b)(2) is designed to "preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done . . . ." Good Luck Nursing Home, Inc. v. Harris, 636

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[4]We note that the Court of Appeals did not decide that defendants had identified newly discovered evidence, as defendants assert, Def. Reply at 23, but rather than defendants were free to file a Fed. R. Civ. P. 60(b)(2) motion if they were so inclined.

F.2d 572, 577 (D.C. Cir. 1980). The one year limitation regarding the filing of Fed. R. Civ. P. 60(b)(2) motions reflects a policy embodied in the Rule that after one year concerns regarding the finality of judgment absolutely outweigh other concerns arising from the existence of newly discovered evidence. While this motion was filed barely within the one year time period, concerns for the sanctity of final judgments likewise weight heavily here, where many parties have come to rely on our judgment, Plaintiffs' Memorandum in Opposition to Def. Motion for Relief from Judgment, at 11, and where defendants have failed to demonstrate that they exercised due diligence in discovering the defects of the document within their possession prior to our judgment, and that they acted within a reasonable period of time after their "discovery" of this evidence, even assuming that their December discovery was excusable.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987
C.A. No. 86-00474

No. 88-7020

FILED: June 28, 1988

1250 Twenty-Fourth Street
Associates Limited Partnership,
et al.

v.

Philip J. Brown, et al.,

Appellants

BEFORE: Wald, Chief Judge; Mikva and
Edwards, Circuit Judges

ORDER

Upon consideration of appellees' motion for summary affirmance, the initial and supplemental oppositions thereto, and the reply, it is

ORDERED by the court that appellees' motion for summary affirmance be granted substantially for the reasons stated in the district court's memorandum filed November 18, 1987.